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No. 79-1539

In the Supreme Court of the United States

OCTOBER TERM, 1979

METRO TRUCK BODY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1—A-8) is reported at 613 F.2d 746. The decision and order of the National Labor Relations Board (Pet. App. C-1—C-11) is reported at 230 N.L.R.B. 212. The Regional Director's denial of election objections and certification of representation (Bd. Case No. 31-RC-3127) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. B-1—B-3) was entered on December 28, 1979, and a petition for rehearing was denied on February 25, 1980. The petition for a writ of certiorari was filed on April 25, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board abused its discretion over representation matters in concluding, without holding an evidentiary hearing, that two ballots marked in Spanish were not ambiguous.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151, *et seq.* are:

> Section 8(a), 29 U.S.C. 158(a). It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).
>
> * * * * *
>
> Section 9(a), 29 U.S.C. 159(a). Representatives designated or selected for the purposes of collective bargaining by the majority of the em-

> ployees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

STATEMENT

The Union [1] won a representation election among a unit of petitioner's ("the Company") employees by a vote of 13 to 9 (Pet. App. C-3). The Company filed objections to the conduct of the election, alleging, *inter alia*, that two ballots were void and should not have been counted because they were marked ambiguously and permitted identification of the voters (R. 21-23, 29-30).[2] The facts concerning this allegation follow:

Approximately 15 of the eligible voters spoke Spanish (R. 48). Therefore the ballots used in the election instructed the employees in both Spanish and English to mark an X in the box labeled "YES-SI" if they favored Union representation or in the box labeled "NO-NO" if they did not (R. 18, 48). Two voters wrote the word "si" in the YES-SI boxes of their ballots instead of marking them with an "X" (R. 21-22, 48). The Company argued that the two ballots—

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[1] Automotive Employees, Laundry Drivers & Helpers Local 88, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America.

[2] "R." references are to the record designated "Volume I Pleadings" used in the court below. A copy has been lodged with the Clerk of this Court.

which were counted as votes for the Union—were ambiguous because the Spanish word "si," which was written in the "yes" box, did not have an accent over the letter "i" and therefore meant "if," not "yes" (*ibid.*). Therefore the Union received only 11 affirmative votes, which, the Company asserted, was less than a majority (R. 22).

The Regional Director rejected the Company's contentions (R. 48-49), and the Board denied review of his decision (R. 60). The Regional Director explained (R. 48-49):

> Inasmuch as construing the marking "si" as "if" would result in a *non sequitur* in the context of the ballot and as the Board has held that writing the word "yes" or "no" on a ballot is a clear indication of the intent of the voter, I conclude that the word "si" printed in the square designated for "yes" votes indicates a clear choice for union representation. Further, as there was no evidence presented to establish that the ballot was deliberately marked for the purpose of identification and as two-thirds of the eligible voters are Spanish speaking, I conclude that the secrecy of the two ballots in question has not been impaired.

The Union was certified as the bargaining representative, the Company refused to bargain, and the Board, on summary judgment, found the Company's refusal to bargain violative of Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1). The Board ordered the Company to bargain with the Union (Pet. App. C-1—C-4, C-7).

The court of appeals upheld the Board's decision and enforced its order (Pet. App. A-8). The court stated that there was "no doubt that the persons who marked the two ballots in question intended to vote in favor of the Union" (Pet. App. A-3).

ARGUMENT

The Company does not challenge the Board's settled policy, upheld by the courts, of counting "all ballots where the voter's intent has been clearly manifested, even if the voter has not followed the proper designation procedure * * *" (*NLRB* v. *Sauk Valley Mfg. Co.*, 486 F.2d 1127, 1133 (9th Cir. 1973)), so long as the unconventionally marked ballots "do not inherently disclose the identity of the voter * * *." *Knapp-Sherrill Co.*, 171 N.L.R.B. 1547, 1548 (1968). Rather the only issue here is whether the Board erred in concluding that the markings on the two ballots were not ambiguous and that ballot secrecy was not breached.[3] That factual issue does

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[3] Contrary to the Company's contention (Pet. 10-11), Fed. R. Evid. 604 relating to the use of translators has nothing to do with the issue here. In the first place, the Company never invoked that Rule before the Board or objected that its requirements were not met. Judicial review of that claim therefore is foreclosed under Section 10(e) of the Act, 29 U.S.C. 160(e). *Marshall Field & Co.* v. *NLRB*, 318 U.S. 253, 255-256 (1943). In any event, the issue here is not whether correct Spanish grammar dictates that an accent mark be used when the term "si" is intended to mean yes. The issue is whether, despite that requirement, the markings on the ballots involved here were unambiguous in the particular context of this Board election.

not warrant review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490 (1951). In any event, for the reasons set forth in the Regional Director's supplemental decision (R. 48-49) and the court's opinion (Pet. App. A-3—A-4), the Board's conclusion was plainly correct.

Similarly, the Company does not dispute the well settled proposition that it is entitled to a hearing on its objections only where substantial and material factual issues exist (Pet. 12-13, citing cases). Rather, the Company merely contends that it has met that test here. This, too, is a factual issue which does not warrant review by this Court.

In any event, the Company's contention (Pet. 13) that the ballots of all employees who voted yes are in question because of the "ambiguity of the mistranslation of the English word 'Yes' " was not raised before the Board (R. 21-22, 53-54), and hence may not be raised here (see note 3, *supra*). Its contention (Pet. 13) concerning the proper tally of ballots were its objections found meritorious has nothing to do with whether it is entitled to a hearing to resolve those objections. Moreover, that contention is erroneous.[4]

[4] The Board requires that, in order to win an election, a union must receive "[a] majority of the valid votes cast * * *." NLRB Case Handling Manual, Part 2, Section 11340.4; *Semi-Steel Casting Co.* v. *NLRB*, 160 F.2d 388, 391 (8th Cir.), cert. denied, 332 U.S. 758 (1947); *NLRB* v. *Vulcan Furniture Mfg. Corp.*, 214 F.2d 369, 372 (5th Cir.), cert. denied, 348 U.S. 873 (1954). Thus, even if, contrary to the findings of the Board and the court below, the two questioned ballots are invalid, as the Company contends, the Union, with 11 votes, received a majority of the 20 valid ballots cast. It was not necessary, as the Company assumes, for the Union to have received 12 votes, a majority of the total number of ballots cast (22).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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